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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

ROBERT D. GILMER,

*Petitioner,*

v.

INTERSTATE/JOHNSON LANE CORPORATION,

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

**BRIEF AMICUS CURIAE OF  
AMERICAN ASSOCIATION OF RETIRED PERSONS  
IN SUPPORT OF PETITIONER**

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**BRIEF *AMICUS CURIAE* OF  
AMERICAN ASSOCIATION OF RETIRED PERSONS  
IN SUPPORT OF PETITIONER**

## STATEMENT OF INTEREST

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-two million persons age fifty and older. More than eleven million of AARP's members are employed, most of whom are protected by the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.*

The aging of the work force and the decreasing number of younger workers entering the work force is enhancing the importance of older workers as a valuable source of labor.<sup>1</sup> Despite these changing demographics,

<sup>1</sup> See Report of the Secretary of Labor, *Older Worker Task Force: Key Policy Issues for the Future* iv (1989).

older workers continue to face discrimination in employment.<sup>2</sup>

More than twenty years ago, Congress enacted the ADEA to eradicate age discrimination in employment and to promote the employment of older workers. 29 U.S.C. § 621(b). Compelling older workers to arbitrate their ADEA claims in order to secure a job circumvents these essential purposes. In this case, the entire securities industry has attempted to insulate its employment practices from the purview of the courts. Older workers will be easy prey for these and other employers who seek to avoid the scrutiny of the courts and the Equal Employment Opportunity Commission (EEOC) by requiring the older workers to sign away their rights to judicial enforcement of the ADEA in order to obtain employment.

Compulsory arbitration provisions contained in employment contracts or applications threaten the protections Congress afforded older workers under the ADEA and undermine the enforcement system Congress designed to eradicate age discrimination from our society. In light of these concerns, AARP respectfully submits this brief *amicus curiae*.<sup>3</sup>

### ISSUE PRESENTED

Whether a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1967), is subject to compulsory arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1925) (FAA).

<sup>2</sup> See D.P. O'Meara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act*, 29 (1989) ("[F]rom 1979 to 1983, the number of age discrimination charges increased by 341 percent"); Spencer's Research Reports on Employee Benefits at 6 (July 20, 1990) (Noting increase in age discrimination charges over the first half of fiscal year 1990, EEOC Chairman Evan J. Kemp stated he is "particularly alarmed at the larger percentage of age discrimination complaints.")

<sup>3</sup> The parties have consented to AARP's filing of this brief; the letters of consent are filed with the clerk.

### STATEMENT OF THE CASE

AARP adopts the Petitioner's statement.

### SUMMARY OF ARGUMENT

The question presented by this case is whether employers may compel employees to arbitrate statutory claims under the ADEA pursuant to a predispute arbitration clause contained in an employment contract.<sup>4</sup> The district court below held that compulsory arbitration of ADEA claims was contrary to the ADEA and could not preclude *de novo* judicial review based on this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Appendix to Petition for Writ of *Certiorari* at 41a-42a. The Court of Appeals for the Fourth Circuit reversed, finding that nothing in the language, legislative history, or underlying purposes of the ADEA overrides the policy favoring arbitration set forth in the Federal Arbitration Act (FAA). *Id.* at 3a.

AARP respectfully submits that the FAA does not apply to employment contracts. Section 1 of the Federal Arbitration Act excludes from the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. When considered in its historical context and viewed in light of its legislative history, there is no doubt that Congress enacted this provision for the express purpose of excluding all employment contracts from the reach of the Act.

Even if the Court finds that the FAA applies to employment disputes, compulsory arbitration inherently

<sup>4</sup> This case does not involve a voluntary agreement after a dispute has arisen to resolve statutory claims by arbitration. In a post-dispute agreement, the parties agree on the issues and claims in dispute and the employee makes a deliberate choice of forums in which to resolve his claims. See Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 Arb. J. 23, 29 (1978).

conflicts with the purposes and structure of the ADEA. Congress enacted the ADEA to eradicate age discrimination in employment. 29 U.S.C. § 621(b). To best accomplish this societal purpose, Congress gave the courts broad injunctive authority to remedy and prevent discrimination in employment. 29 U.S.C. §§ 626(b), (c). Arbitration lacks this societal effect because it is typically limited to the particular dispute between the parties and does not have far reaching effects on other members of the protected class. Industry-wide arbitration of employment disputes prevents achievement of the congressional objective of eliminating discrimination from our society.

Congress designed the ADEA to provide victims of discrimination the choice of a variety of forums in which to resolve their claims. 29 U.S.C. §§ 626(b), (c), & (d). Compulsory arbitration takes this choice away from the employee and gives it instead to the employer, contrary to the statutory scheme Congress established. The older worker who needs a job has no choice but to acquiesce to the employer's demands in order to get the job.

The far reaching effects of the Court's decision in this case cannot be overstated. Whole industries will attempt to remove themselves from the purview of the courts and enforcement agencies by including compulsory arbitration provisions in employment applications and contracts. The multitude of statutes protecting employees' rights will be subject to the vagaries of individual arbitrators. Surely, Congress could not have intended such a result.

## ARGUMENT

### INTRODUCTION

Until the decision of the Court of Appeals for the Fourth Circuit below, the circuit courts of appeals had consistently held that employment discrimination claims could not be subject to compulsory arbitration under the Federal Arbitration Act, 9 U.S.C. § 1. See *Alford v. Dean Witter Reynolds*, 905 F.2d 104 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), cert. denied, 110 S. Ct. 842 (1990); *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), cert. denied, 110 S. Ct. 143 (1989). These courts had not questioned the underlying issue of whether the FAA even applies to arbitration clauses in employment contracts. Similarly, the parties below did not question whether the FAA applies to disputes between employers and employees.

The application of the FAA to employment contracts has apparently not been an issue for two reasons. First, this Court's opinions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), have been viewed as controlling authority on the issue of whether arbitration clauses in employment contracts could deny an employee *de novo* judicial review of claims arising under employment or discrimination statutes.

Second, the early case law interpreting the FAA narrowly construed the exclusion of employment contracts in Section 1 to apply only to workers in the transportation industry, based on an incomplete review of the legislative history of the FAA. *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1953) (*en banc*). See *Dickstein v. DuPont*,

443 F.2d 783 (1st Cir. 1971); *Pietro Scalziti Co. v. International Union of Operating Engineers*, 351 F.2d 576 (7th Cir. 1965); *Signal-Stat Corp. v. Local 475, United Electrical Radio and Machine Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957).

Thirty-three years ago, this Court was presented with comprehensive arguments asserting that the exclusion of employment contracts in Section 1 of the FAA was inserted into the Act for the express purpose of ensuring that the FAA would not apply to any employment contracts. See Briefs in *General Electric Co. v. Local 205, United Electrical Radio and Machine Workers of America (U.E.)*, 353 U.S. 547 (1957); *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957); *Goodall-Sanford, Inc. v. Textile Workers of America Local 802*, 353 U.S. 550 (1957). Rather than resolving the issue under the FAA, the Court ruled that arbitration clauses in collective bargaining agreements were specifically enforceable under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1947). *Id.* Justice Frankfurter would have ruled explicitly that the FAA simply did not apply to collective bargaining agreements based on the legislative history. *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448, 460, 466-69 (1957) (Frankfurter, J., dissenting).

Once again, the applicability of the FAA to employment contracts confronts the Court. Whether the FAA applies to employment contracts depends on the interpretation of Section 1 of the Act, which excepts certain contracts, as well as on the interpretation of Section 2 of the Act, which makes contracts to arbitrate covered by the Act enforceable. Thus, whether all employment contracts are excluded from the FAA is a subsidiary issue within the question on which *certiorari* was granted. While the parties before the court of appeals below did

not brief whether Section 1 applied to this case,<sup>5</sup> the issue is central to the resolution of the case and to the question upon which *certiorari* was granted.

# **I. THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO EMPLOYMENT CONTRACTS.**

The Court has never squarely addressed the meaning of the language in FAA § 1 excluding contracts of employment from the Act.<sup>6</sup> The legislative history plainly reveals that the exception for contracts of employment in Section 1 of the FAA was added for the express purpose of excluding all worker contracts from the Act.

<sup>5</sup> Gilmer argued in the district court that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), controlled this case and prevailed. In defending that ruling in the court of appeals, Gilmer did not argue, as an alternative ground for affirmance, that Section 1 of the FAA excludes employment contracts from the Act.

<sup>6</sup> The Court left open the meaning of the exclusion in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). The Court stated that an employment contract was not covered by § 2 because there was no evidence that in performing duties under the contract, the employee "was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." 350 U.S. at 200-01. The Court expressly did not reach the issue of the scope of the exclusion in Section 1. 350 U.S. at 201 n.3.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) the Court cited Section 1 as authority for the point that "categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act."

In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court ruled that the FAA preempted a California statute authorizing civil actions for the collection of wages regardless of any agreement to arbitrate such a dispute. The Court declined to address the argument that the arbitration provision contained in the employment contract was unenforceable as a contract of adhesion. 482 U.S. at 492 n.9. The issue of the scope of the Section 1 exclusion for employment contracts was not briefed by the parties nor addressed by the Court.

As an initial matter, there is no dispute that the advocates supporting the enactment of the FAA were businessmen whose sole concern was to overturn the common law rule which denied specific enforcement of agreements to arbitrate in contracts between businessmen.<sup>7</sup> The Act was drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar Association,<sup>8</sup> acting upon instructions from the Association to consider and report upon "the further extension of the principle of commercial arbitration." 45 A.B.A. Rep. 75 (1920).

In December 1922, the Committee's proposal was simultaneously introduced as a bill in the Senate (S. 4214) and in the House (H.R. 13522). 64 Cong. Rec. 732, 797 (1922).

As introduced, Section 2 of the bills made written "provisions for arbitration" enforceable in "any contract or maritime transaction or transaction involving commerce." *Id.* Section 1 contained no exception for contracts of employment and defined commerce and "maritime transactions." The definition of maritime transactions included agreements relating to "seaman's wages" and any other matter within admiralty jurisdiction.

At the Seamen's Union Convention in 1923, Andrew Furuseth, president of the Seamen's union, announced his concern that the Federal Commercial Arbitration bill could be applied to preclude seamen from bringing dis-

<sup>7</sup> H.R. Rep. 96, 68th Cong., 1st Sess. 1-2 (1924). See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before A Subcommittee on the Judiciary on S.4213 and S. 4214*, 67th Cong., 4th Sess. (1923), at 9 (Statement of W.H.H. Piatt) (hereinafter "Senate hearing").

<sup>8</sup> See 50 A.B.A. Rep. 356-362 (1925) for a detailed history of the American Bar Association's efforts to overturn the common law rule.

putes arising out of their employment to court.<sup>9</sup> He warned:

Let a clause to arbitrate be placed in any contract and any dispute about the meaning and enforcement of the contract must be referred to arbitration and the court with all the Saxon rule of procedure and constitutional guarantees ceases to operate . . . . Place in the contract to labor—that any disagreement shall be attributed by the Shipping Commission (under existing statutes this includes consuls) and the seaman's right to wages, to food, to damages under the Jones Act together with his present right to quit work in harbor becomes void. With the seaman, the machinery is there and ready. The shipowner only needs this bill to become law and slavery is restored without any other noise, except such as the victim may make . . .

<sup>9</sup> Seamen sign individual contracts of employment, and in the early 1920's, those contracts typically provided that any disputes between an individual seaman and the ship owner or its agent would be decided by a shipping commissioner and that decision would be binding on the courts. *Proceedings of the Twenty-Fourth Annual Convention of the International Seamen's Union of America*, 27-28 (1921).

Mr. Furuseth had taken issue with the arbitration clauses being inserted into the shipping articles which individual seamen were required to sign:

The one provision found in nearly all of these insertions to the effect that the Shipping Commissioner shall act as arbitrator of any or all disputes and that such decision as he may make shall be final is intended to deprive the seaman of the right to appeal to the courts. The Shipping Commissioners Act gives no such power to the Commissioner, unless there is a submission in writing and such submission is made after the dispute has arisen and not prior to entering into the agreement. It has no right in the articles. I have discussed this clause with the Commissioner of Navigation and he admitted that it is not strictly according to law; but if the men are not willing to sign such clause they need not. This is nothing short of inviting the men to strike to get the law enforced. If the seaman does this, all the blame is heaped on him.

*Id.* at 28-9.

*Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America, 203-04 (1923).*<sup>10</sup>

At the Senate Judiciary subcommittee hearings on the bill, Chairman Sterling asked W.H.H. Piatt, chairman of the ABA committee responsible for drafting the bill to respond to the concerns expressed by Mr. Furuseth. Mr. Piatt assured the Chairman that the bill was never intended to apply to any employer-employee disputes. He emphasized:

Now, it was not the intention of the bill to have any such effect. It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.' *It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

Senate hearing, at 9 (Statement of W.H.H. Piatt) (emphasis added). Senate Judiciary Committee Chairman Sterling and Senator Walsh shared both this concern and Mr. Piatt's understanding of the bill. Senate hearing, at 10-12 (Remarks of Sen. Sterling, Sen. Walsh).

At the Senate hearing, Senator Walsh was particularly concerned that the Act not apply to contracts of employment. He stated:

<sup>10</sup> Mr. Furuseth was also concerned that if the union agreed to arbitration clauses in a collective bargaining agreement, the result would bind the members. *Id.*

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [sic] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Senate hearing, at 9 (Remarks of Sen. Walsh).

To alleviate the concern that the commercial arbitration bill could apply to employment disputes, Secretary of Commerce Herbert Hoover proposed language to exempt contracts of employment from the bill. In a letter introduced by Chairman Sterling, Secretary Hoover recommended:

If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'

Senate hearing at 14.

While the original Senate bill was not reported out of committee in the 67th Congress,<sup>11</sup> an amended bill was reintroduced in the 68th Congress as S. 1005 and in the House as H.R. 646, 68th Cong., 1st Sess. (1924).<sup>12</sup> At joint

<sup>11</sup> There was no hearing in the House on the companion bill, H.R. 13522, and it was not reported out of Committee, either.

<sup>12</sup> As introduced in the 68th Congress and referred to the judiciary committees, the FAA made written provisions to arbitrate enforceable in "any contract or maritime transaction or transaction involving commerce." S.1005, 68th Cong., 1st Sess., § 2 (1924);

hearings before the Senate and House Judiciary Subcommittees, Mr. Piatt testified that in light of the desire to clearly exclude employment contracts as expressed by Senators Sterling, Walsh and other members, the ABA had redrafted the bill. *Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 10-11 (1924) (Joint Hearings).*

As redrafted by the ABA and introduced into the 68th Congress, the bill added the exact language to Section 1 that Secretary Hoover had suggested be used to exempt workers' contracts from the Act.<sup>13</sup> Also, the inclusion of "seamen's wages" within the definition of maritime transaction in Section 1 was deleted.

The legislative proceedings of the Federal Commercial Arbitration bill clearly demonstrate that the scope of the bill was limited to arbitration involving commercial transactions. At the Joint Hearings, more than seventy commercial organizations—trade associations, chambers of commerce and bankers' associations—that had endorsed the bill were represented. Not a single labor union appeared. There was no testimony nor any suggestion that the bill was in any way intended to apply to individual contracts of employment or collective bargaining agreements.

On the floor of the Congress, House Judiciary Committee Chairman Graham described the bill's commercial character:

H.R. 646, 68th Cong., 1st Sess., § 2 (1924). This language was changed in the Senate Judiciary Committee to make enforceable written provisions to arbitrate "any maritime transaction or a contract evidencing a transaction involving commerce." S. Rep. 536, 68th Cong., 1st Sess. (1924). The substitute language was proposed by Sen. Walsh for grammatical, not substantive, reasons. 66 Cong. Rec. 2761 (1925) (remarks of Sen. Sterling).

<sup>13</sup> Secretary Hoover sent another letter to the Senate Judiciary Committee Chairman (Senator Brandegee), urging the adoption of the bill, expressing the same views he had expressed to Senator Sterling and enclosing a copy of the prior letter. Joint hearings, at 20-21.

The bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in *commercial contracts* and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.

\* \* \*

It creates no new legislation; grants no new rights, except a remedy to enforce agreements in *commercial contracts* and in admiralty contracts.

65 Cong. Rec. 1931 (1924) (emphasis in text).

At the time, the business, labor and legal interests most affected by the FAA all viewed the Act as inapplicable to contracts of employment. Business representatives did not champion the FAA to create a federal law binding employers to arbitrate employment disputes with individual employees. Also, the American Federation of Labor did not view the FAA as applying to union contracts. In describing the FAA in its 1925 annual report, the Executive Council of the Federation stated:

Protests from the American Federation of Labor and the International Seamen's Union brought about an amendment which provides that 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' This exempts labor from the provisions of the law, although its sponsors denied that there was any intention to include labor disputes.

*Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor, 52 (1925).*

The very next year, the same ABA Committee on Commerce which had drafted the FAA started work on a bill that would similarly enforce agreements to arbitrate in the labor arena. Noting that "Congress had already enacted a statute providing a method for the settlement of commercial disputes by means of arbitration," the Committee stated that "it was convinced that a similar statute may properly be enacted by Congress providing

for the settlement in like manner of industrial disputes." 51 A.B.A. Rep. 394 (1926). Organized labor opposed the idea as another example of the hated labor injunction. 19 *American Federation of Labor Weekly News Service*, No. 5 (April 13, 1929). As a result, the ABA Committee on Commerce concluded in 1930 that "public opinion is not yet ready for this legislation" and that "it would be a mistake to press it actively at the present time." 55 A.B.A. Rep. 328 (1930).

The clear meaning of the legislative history of the FAA is that Congress intended to exclude all employment contracts from the reach of the FAA, both individual contracts and collective bargaining agreements.<sup>14</sup>

Recent cases have addressed whether the FAA applies to disputes arising under collective bargaining agreements. In *United Paperworkers International Union v. Misco*, 484 U.S. 29, 40 n.9 (1987), the Court indicated that Section 1 excluded collective bargaining agreements from the FAA, and did not limit the exclusion to workers in the transportation industry as did early circuit courts of appeals.<sup>15</sup> Recent decisions of the courts of appeals

<sup>14</sup> There can be no doubt that in his employment, Gilmer was "engaged in interstate commerce." The securities broker's work is the trading of securities in interstate commerce. The proper inquiry is whether the class of workers to which the worker belongs engages in interstate commerce, not whether the individual worker is actually engaged in interstate commerce. *Bacashihua v. United States Postal Service*, 889 F.2d 402, 405 (6th Cir. 1988) (postal workers are employees in interstate commerce within the meaning of Section 1 of the FAA). Thus, no issue is presented here concerning the meaning of the phrase "engaged in commerce" within Section 1 of the FAA. See *Second Employers' Liability Cases*, 223 U.S. 1, 51-2 (1912).

<sup>15</sup> See, *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America Local 437*, 207 F.2d 450 (3d Cir. 1953) (*en banc*). In *Tenney*, the United States Court of Appeals for the Third Circuit found only a reference in a 1923 ABA com-

for the First, Third, Sixth and Eleventh Circuits also have not limited the exclusion to workers in the transportation industry. See *Derwin v. General Dynamics Corp.*, 719 F.2d 484, 488 n.3 (1st Cir. 1983); *Service Employees International Union Local 36 v. Office Center Services, Inc.*, 670 F.2d 404, 406 n.6 (3d Cir. 1982); *Bacashihua v. United States Postal Service*, 859 F.2d 402, 404-05 (6th Cir. 1988); *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466 (11th Cir. 1987).

Accordingly, as Section 1 of the FAA excludes Petitioner's contract of employment from the reach of the Act, the court of appeals was incorrect in ruling that the FAA requires compulsory arbitration of Petitioner's employment discrimination claim.

## II. COMPULSORY ARBITRATION INHERENTLY CONFLICTS WITH THE PURPOSES AND STRUCTURE OF THE ADEA.

As this Court has recognized, not "all controversies implicating statutory rights are suitable for arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). To determine whether statutory claims may be subject to arbitration, a court must consider whether the text, legislative history, and purposes of the underlying statute reflect an "inten[t] to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987). While the Court

mittee report to the exclusion, and did not review any of the legislative history discussed herein.

The federal courts of appeals for the First, Second, and Seventh Circuits followed *Tenney* without independent analysis. See *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971); *Pietro Scalziti Co. v. International Union of Operating Engineers*, 351 F.2d 576 (7th Cir. 1965); *Signal-Stat Corp. v. Local 475, United Electrical Radio and Machine Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957).

has interpreted the FAA to require arbitration of commercial disputes, the Court has also emphasized that the statutory rights of employees raise significantly different considerations which may override the policy encouraging arbitration. See *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 565 (1987). The purposes and structure of the ADEA demonstrate that compulsory arbitration inherently conflicts with the ADEA.<sup>16</sup>

**A. Compulsory Arbitration Conflicts with the Congressional Purpose of Eradicating Employment Discrimination from Society.**

Congress enacted the ADEA to "prohibit arbitrary age discrimination in employment" because such discrimination was pervasive in society. 29 U.S.C. §§ 621(a), (b).<sup>17</sup> To achieve this objective, Congress provided for broad prohibitions, extensive remedies, and administrative and judicial enforcement. 29 U.S.C. §§ 626(b), (c), (d).

Authorizing the courts to issue broad injunctive relief is the cornerstone to eliminating discrimination in society. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). Injunctions allow the courts to prevent employers from discriminating against other employees and from engaging in other unlawful employment practices. Class-wide relief changes employment practices—a benefit to many members of the protected class who may not even be plaintiffs in the suit.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), the Court relied on statutory provisions granting injunctive and affirmative relief in Title VII of the

<sup>16</sup> Nothing in the text or legislative history of the ADEA references resolution of claims pursuant to private arbitration.

<sup>17</sup> "We do find substantial evidence of . . . discrimination based on unsupported general assumptions about the effect of age on ability . . . ." See Report of the Secretary of Labor, *The Older American Worker*, reported in *Legislative History of the Age Discrimination in Employment Act*, at 5 (1965).

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to demonstrate that Congress assigned to the courts "plenary powers to secure compliance" with the statute. In civil rights cases, "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. at 45. The Court viewed the significance of injunctive relief in accomplishing the statutory purpose as strong evidence of congressional intent that judicial resolution of discrimination claims could not be displaced by arbitration. *Id.*

The ADEA shares the same goal as Title VII of eliminating discrimination from the workplace, *Lorillard v. Pons, Inc.*, 434 U.S. 575, 584 (1978), and similarly authorizes the courts to award broad injunctive relief to achieve the purposes of the Act. 29 U.S.C. § 626(b). As in other civil rights statutes, the provision for injunctive relief in the ADEA reflects Congress' intent to eliminate age discriminatory practices on a sweeping, class-wide basis. See *Lorillard v. Pons, Inc.*, 434 U.S. at 584. Such relief generally benefits other older workers in the protected class and achieves the congressional objective of eradicating discrimination in employment.

In contrast, commercial arbitration of disputes lacks the societal premise and broad purpose that underly the civil rights statutes. Commercial arbitration is typically limited to a specific dispute between the particular parties. See American Arbitration Association, *Commercial Arbitration Rule 17* (1981); Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an 'Adequate Substitute' for the Courts?*, 68 Texas L. Rev. 509, 568 (1990). The available remedies are usually limited to the individual and generally do not provide for injunctive relief. See Shell, 68 Tex. L. Rev. at 568.

Similarly, arbitration does not provide for class-wide participation or relief to redress class-wide policies or practices. Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 Arb. J. 23, 29 (1978). The representative class action mechanism is central to enforcement of the ADEA because it allows similarly situated individuals to join together in litigation. See *Hoffman-La Roche Inc. v. Sperling*, — U.S. —, 110 S. Ct. 482 (1989). These limitations on the nature and extent of the remedies available in arbitration make it ill-suited for accomplishing the broad congressional purpose of eradicating age discrimination from our society.

**B. The Statutory Purpose of Protecting Employees from the Inequalities of the Employment Relationship Warrants Against the Use of Compulsory Arbitration.**

Nothing in the Court's recent approval of arbitration of commercial disputes<sup>18</sup> suggests that the Court has overruled or retreated from its previous holdings that arbitration of an employment dispute may not bar employees from pursuing their statutory claims in court. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).<sup>19</sup> Indeed, the Court's most recent examination

<sup>18</sup> See *McMahon*, 482 U.S. 220 (1987) (upheld arbitration agreement between customers and brokerage firm; claims under the Securities Exchange Act of 1934, SEC Rule 10b-5, and the Racketeer Influenced and Corrupt Organizations Act (RICO)); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, — U.S. —, 109 S. Ct. 1917 (1989) (upheld arbitration agreement between securities investors and brokerage firm; claims under the Securities Act of 1933 and the Securities Exchange Act of 1934); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) (upheld arbitration agreement between securities investors and broker-dealer; claims under state law.)

<sup>19</sup> While *Barrentine* and *Alexander* involved the arbitration of claims under collective bargaining agreements, the Court's analysis of whether arbitration precludes judicial review is instructive in the case of individual employment contracts. In *Barrentine* and

of compulsory arbitration of an employment dispute reaffirms the Court's commitment to upholding judicial review of claims deriving from statutes designed to provide workers with minimum federal protections.

In *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), a unanimous Court relied on its previous holdings in *Barrentine* and *Alexander* to conclude that a claim under the Federal Employers' Liability Act for personal injuries was not precluded by the availability of arbitration under the Railway Labor Act. While the Court gave due deference to the strong national policy favoring arbitration, it reiterated that

different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

480 U.S. at 565, quoting *Barrentine*, 450 U.S. at 737.

*Alexander*, the Court analyzed the inherent conflict between arbitration and the purposes and structures of the statutes, which is analogous to the current analysis used by the Court. See *McMahon*, 482 U.S. at 227. While the Court's recent decisions call into question the portions of *Barrentine* and *Alexander* that express a distrust of the arbitration system and the authority of the arbitrator, those considerations are not central to their analyses.

Nor is there any basis for distinguishing *Barrentine* and *Alexander* because the claims subject to arbitration were contractual and not statutory. The contractual claims mirrored the statutory claims upon which the employees later brought suit. See *Barrentine*, 450 U.S. at 732 (claim for wages under the collective bargaining agreement were compensable under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1938)); *Alexander*, 415 U.S. at 42 (collective bargaining agreement prohibited race discrimination similar to Title VII's prohibition). In holding that arbitration of contractual claims did not preclude litigation of the employee's statutory rights in *Barrentine* and *Alexander*, the Court implied that statutory rights could not be subject to arbitration when arbitration was compelled by the collective bargaining agreement. Similarly here, arbitration is compelled by the employer and the securities industry.

An essential difference between employment contracts and commercial contracts is the inherent inequality in the employment relationship, which Congress and this Court have historically recognized as requiring greater protections for employees. The relationship between employer and employee simply does not involve the same type of equal bargaining or mutual decisionmaking that exists in the relationship between buyer and seller.

The foundation of this nation's labor laws is to remedy the inequality of bargaining power between the individual employee and his employer. Congress recognized this fundamental concern in enacting the Norris-LaGuardia Act, finding that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . ." 29 U.S.C. § 102 (1932).<sup>20</sup>

More recently, Congress reiterated this concern in disapproving of waivers under the ADEA outside the supervision of a court or the Equal Employment Opportunity Commission. Senator Melcher, Chairman of the Senate Select Committee on the Aging emphasized the

inherently different bargaining power of employers and employees. There will always be employees who feel that if they do not sign a waiver they will not only be out of a job, but also will forfeit any present or future benefits to which they may otherwise be entitled.

S. Rep. 79, 101st Cong., 1st Sess. 7 (1989) (quoting 133 Cong. Rec. S.14383 (daily ed. Oct. 15, 1987)).

This Court has similarly recognized the inherent inequality between employees and employers as a fundamental underpinning of employment statutes. Finding

<sup>20</sup> Even when employees gain collective power by organizing unions, the interests of the individual employee may not be adequately protected. See *Alexander v. Gardner-Denver Co.*, 415 U.S. at 59.

that a waiver of rights under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1938) (FLSA), was contrary to public policy, the Court admonished that "employers might be able to use superior bargaining power to coerce employees to . . . waive their protections under the Act." *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985). Justice O'Connor shared this concern in the case of a state statute intended to protect employees "from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance." *Perry v. Thomas*, 482 U.S. 483, 495 (1987) (O'Connor, J., dissenting).

The "agreement" to arbitrate at issue in this case is contained in the "Uniform Application for Securities Industries Registration Form," which all employees who deal in securities before the exchanges must sign. Appendix to Petition at 40a. The arbitration provision does not state that it applies to claims under federal or state employment laws. Appendix to Petition at 41a. Such arbitration provisions are typically mandatory and non-negotiable. See Baxter and Hunt, *Alternative Dispute Resolution: Arbitration of Employment Claims*, 15 Empl. Rel. L. J. 187, 191 (1989). An individual who wants to work in the securities industry has no choice but to sign the form or seek employment elsewhere—an alternative that is not readily available to many older workers.<sup>21</sup>

In an employment discrimination case, the very entity accused of violating the employee's rights, the employer, determines and controls the forum and the manner in which the employee's civil rights will be resolved. This glaring anomaly was of great concern to Chief Justice

<sup>21</sup> See Report of the Secretary of Labor, *Labor Market Problems of Older Workers* 21 (1989). The chance of reemployment declines significantly with age. *Displaced Older Workers: Hearing Before the Select Comm. on Aging*, 99th Cong., 1st Sess. 46 (1985).

Burger who explained his vote in *Alexander v. Gardner-Denver Co.*:

Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

*Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

The same concern applies here, where the employer accused of discrimination and the employer's industry mandate arbitration and unilaterally establish all of the rules and terms of the process. Arbitrators in these cases are members of the securities industry themselves and therefore may not be impartial. See *Shell*, at 569. In the ADEA,<sup>22</sup> Congress sought to counteract the superior power of the employer and the inherent bias in a system controlled by the employer by establishing *de novo* judicial review to insure an independent and objective resolution of the claim.

### C. Compulsory Arbitration Eliminates the Employee's Choice of Forum Which the ADEA Safeguards.

The ADEA embodies a panoply of enforcement provisions which make arbitration incompatible with the stat-

<sup>22</sup> Recent amendments to the ADEA reaffirm the importance of the protections Congress has consistently provided to employees to insure that their rights are secure. The Older Workers' Benefit Protection Act, Pub. L. 101-433, Title II, amends the ADEA to establish stringent standards for releases, settlements, and waivers. *Id.* The Act applies to waivers executed after the date of enactment, Pub. L. 101-433, Title II, § 202, and was signed into law on October 16, 1990. *President Signs Betts Bill Extending Age Bias Protection to Benefit Plans*, Daily Lab. Rep. (BNA) No. 202, at A-3 (Oct. 18, 1990).

utory scheme. First and foremost, the ADEA grants the individual plaintiff a variety of choices of forum to obtain relief for the discrimination he has suffered. 29 U.S.C. §§ 626(b), (c), (d), 633.

It is the employee, not the employer, who initiates the administrative process either before the EEOC or a state agency. It is the employee, not the employer, who decides when and where to seek judicial relief, as the ADEA permits the employee to abandon the administrative process and proceed in court any time after sixty days have elapsed from the filing of the charge of discrimination. 29 U.S.C. § 626(d). It is the employee, not the employer, who subsequently decides to proceed in federal or state court. These choices are denied the employee and awarded instead to the employer by the predispute arbitration provision.

Congress sought to safeguard not only a wide range of choices, but insured that even preliminary action taken in a nonjudicial forum would not preclude an ultimate decision by the courts. When Congress adapted Title VII's administrative scheme to the ADEA, it provided that administrative review and determinations would not affect the individual's right to *de novo* review by the courts. As the Court recognized in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470 n. 7 (1982):

Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a state's own courts.

Similarly, the courts have held that a state administrative determination does not preclude a *de novo* federal court action. *Id.*; *University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *Solimino v. Astoria Federal Savings & Loan Assoc.*, 901 F.2d 1148 (2d Cir. 1990); *petition for*

*cert. filed*, No. 89-1895 (May 30, 1990); *Duggan v. Board of Education*, 818 F.2d 1291 (7th Cir. 1987); *contra Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988).

Enforcing a compulsory arbitration provision eliminates the employee's right to choose the appropriate forum and precludes *de novo* judicial review. These effects of compulsory arbitration plainly conflict with the multiforum structure Congress designed for the ADEA, and make compulsory arbitration incompatible with the Act.

### III. REQUIRING COMPULSORY ARBITRATION OF EMPLOYMENT CLAIMS WOULD ELIMINATE WHOLE CATEGORIES OF EMPLOYEES AND STATUTORY CLAIMS FROM THE PURVIEW OF THE COURTS.

The Court's decision in this case will have far-reaching effects on the enforcement of numerous federal employment statutes such as Title VII, 42 U.S.C. § 2000e *et seq.*, the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the Employee Retirement Security Income Act, 29 U.S.C. § 1001 *et seq.*, the Equal Pay Act, 29 U.S.C. § 206(d) *et seq.*, and the newly enacted Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA). The circuit courts of appeals that have considered this issue unanimously relied on *Alexander v. Gardner-Denver* to preclude arbitration of Title VII claims and ADEA claims until the decision below.<sup>23</sup> A ruling by this Court requir-

<sup>23</sup> See *Alford v. Dean Witter Reynolds*, 905 F.2d 104 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 842 (1990); *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1553 (10th Cir. 1988); *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59 (7th Cir. 1986); *Criswell v. Western Airlines, Inc.*, 729 F.2d 544, 547-49 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985).

ing compulsory arbitration of ADEA claims would have to naturally restrict or overrule *Alexander v. Gardner-Denver* due to the similarities between Title VII and the ADEA.

Requiring compulsory arbitration of statutory employment claims would effectively exempt entire industries from the scrutiny of the courts and enforcement agencies regarding their employment practices. See *Nicholson v. CPC International, Inc.*, 877 F.2d 221, 231 (3d Cir. 1989). The securities industry has made a concerted effort to enforce the arbitration provision in its registration form by making it mandatory and non-negotiable. A ruling by this Court sanctioning the use of such contracts of adhesion would encourage other industries and employers to adopt similar arbitration provisions.

Since decisions of individual arbitrators do not have precedential effect, employees would be forced to litigate issues over and over again as there would be no legal precedent to prevent employers from engaging in recurring discriminatory practices. Enforcing compulsory arbitration provisions contained in employment applications or contracts would emasculate the ADEA and thwart the congressional goal of eradicating discrimination. Only by rejecting compulsory arbitration and preserving the employee's right to *de novo* judicial review will the Court give full effect to that laudable goal.

**CONCLUSION**

AARP respectfully submits that the decision of the Fourth Circuit should be reversed and the case remanded to the district court for further proceedings on Petitioner's ADEA claim.

Respectfully submitted,

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